***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 74-2295

In The

## United States Court of Appeals

For The Second Circuit

FANNY HANDEL,

*Plaintiff-Appellee,*

*vs.*

MEYER GOLD,

*Defendant-Appellant,*

and

PREL CORPORATION,

*Defendant.*

*On Appeal from an Order from the United States District Court -- Southern District of New York*

BRIEF FOR PLAINTIFF-APPELLEE

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BRIEF FOR PLAINTIFF-APPELLEE

ISSUE UPON APPEAL

Whether the District Court abused its discretion in denying the motion under Federal Rule of Civil Procedure 60(b)* by MEYER GOLD, defendant-appellant herein, to vacate

*Rule 60(b) F.R.C.P. is included in the appendix to this brief.

the default judgment against him upon the claimed ground of mistake and excusable neglect, where the default judgment was entered against GOLD for his persistent and willful refusal over a period of about 15 months to answer plaintiff's interrogatories notwithstanding entry of an order by Judge Bonsal against GOLD (served upon both GOLD's personal attorneys in New Jersey and GOLD's New York attorneys of record herein) directing GOLD to answer the interrogatories and conditionally striking GOLD's answer unless he answered the interrogatories and notwithstanding, further, repeated notices thereafter that a default would be taken against GOLD unless he answered the interrogatories; where, after entry of judgment against GOLD, plaintiff served GOLD personally with a notice of deposition "in aid of the judgment against said MEYER GOLD," which notice GOLD ignored and the office of GOLD's personal attorneys in New Jersey telephonically advised plaintiff's attorney that no one (neither GOLD nor any of his attorneys) would appear for the deposition; and where GOLD did not move to set aside the judgment against him until about six months after its entry (and until about five months after service upon GOLD personally of the notice to take his deposition "in aid of the judgment against said MEYER GOLD") when plaintiff

succeeded in attaching GOLD's multi-million dollar apartment house complex in New Jersey.

## STATEMENT OF FACTS

This is an appeal from an order of Judge Duffy (sitting for Judge Bonsal to whom the case had been assigned and who was on vacation) denying a motion under Federal Rule 60(b) by MEYER GOLD, defendant-appellant herein, to vacate a default judgment against him in the sum of $169,000.

The within action is a derivative action brought by a stockholder of PREL CORPORATION, a corporation registered under the Securities Exchange Act of 1934, to recover, pursuant to Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. §78p), the profits made by GOLD, a 10% beneficial owner of PREL, in the purchase and sale within six months of PREL's common stock. Plaintiff's interrogatories to GOLD sought information from GOLD as to his purchases and sales of PREL stock (16a-20a).* These interrogatories were personally served on GOLD, together with the summons and complaint herein, on January 15, 1973 (24a). Although this action had been instituted on September 12, 1972 (1a), the Marshall was unable, for about four months, to serve GOLD who was apparently avoiding service.

*References to the joint appendix on this appeal are signified by "a".

By letter dated January 26, 1973 (34a) GOLD's personal New Jersey attorney, William D. Kaufman, Esq. of Kaufman & Kaufman, Elizabeth, New Jersey, obtained from plaintiff's attorney an extension of time for GOLD to answer till February 25, 1973. Not till March 12, 1973, however, was an answer filed herein on behalf of GOLD by the Manhattan firm of Finkelstein, Benton & Soll (25a). The answer denied purchases and sales of PREL stock by GOLD as alleged in the complaint (13a-15a). However, no answers were filed to the interrogatories which had been personally served with the complaint on GOLD and which requested sworn answers by GOLD as to his purchases and sales of PREL stock.

By letter to plaintiff's attorney dated March 13, 1973 (75a), GOLD's New Jersey attorney, William D. Kaufman, Esq., offered to supply a certification from GOLD's accountant that GOLD had made no profit in PREL stock. By letter dated March 15, 1973 to William D. Kaufman, Esq. (76a) plaintiff's attorney answered requesting that GOLD answer the interrogatories that had been served upon him and that GOLD supply plaintiff with copies of the basic documents.

However, GOLD's answers to the interrogatories still were not forthcoming. Between this exchange of correspondence

and May 23, 1973, plaintiff's attorney made two telephone calls about the interrogatories to Finkelstein, Benton & Soll, GOLD's New York attorneys of record in the case (25a). GOLD still did not answer the interrogatories.

Plaintiff was finally forced to move by notice of motion dated May 23, 1973 (38a) to strike GOLD's answer for his persistent failure to answer the interrogatories. This motion was served upon both Kaufman & Kaufman (GOLD's personal attorneys in New Jersey) and Finkelstein, Benton & Soll (GOLD's Manhattan attorneys of record herein)(42a).

Plaintiff's motion to strike GOLD's answer was returnable May 29, 1973 (38a). (The Clerk had previously noticed for May 29, 1973 a pretrial conference before Judge Bonsal, to whom the case had been assigned (36a-37a)). However, no one appeared for GOLD on May 29, 1973 (25a).

In order to afford GOLD every opportunity to present his position, Judge Bonsal directed plaintiff to submit an order on notice directing GOLD to answer the interrogatories and striking GOLD's answer unless he answered the interrogatories (25a, 45a). Thereupon, by notice dated May 31, 1973 (44a-45a) plaintiff noticed for settlement on June 7, 1973 an order

directing GOLD to answer the interrogatories and striking GOLD's answer unless he answered the interrogatories by July 2, 1973. This notice was served upon both Kaufman & Kaufman and Finkelstein, Benton & Soll (46a). However, no one appeared for GOLD on June 7, 1973 (the settlement date) (26a) and Judge Bonsal signed the order directing GOLD to answer the interrogatories and conditionally striking GOLD's answer unless he answered the interrogatories by July 2, 1973 (45a).

The due date of July 2, 1973 came and passed without any answers being made by GOLD to the interrogatories (26a). Judge Bonsal nevertheless required plaintiff to again move before him, this time for judgment by default, an inquest and other relief (26a). Plaintiff so moved by notice of motion dated October 5, 1973 and returnable October 15, 1973 (47a). Plaintiff duly served this motion upon Finkelstein, Benton & Soll, GOLD's New York attorneys of record in this case (51a).

No one appeared for GOLD on October 15, 1973 (26a). Pursuant to Judge Bonsal's instructions (26a), plaintiff's attorney, by notice dated October 15, 1973 (53a), noticed for for settlement on October 22, 1973 an order directing entry of a default judgment and the holding of an inquest before

Magistrate Jacobs (54a-55a).

Following the by now familiar pattern, no one appeared on behalf of GOLD on October 22, 1973 (26a). Accordingly, on October 23, 1973, Judge Bonsal signed an order that judgment by default be entered and that an inquest be held before Magistrate Jacobs (54a-55a).

By letter dated December 3, 1973 (62a) plaintiff advised Finkelstein, Benton & Soll, that the inquest hearing before Magistrate Jacobs would take place on December 19, 1973. By notice of entry dated December 5, 1973 (63a), plaintiff also served Finkelstein,Benton & Soll (66a) with Judge Bonsal's order of October 23, 1973 directing entry of a default judgment against GOLD and the holding of an inquest before Magistrate Jacobs.

(Because of GOLD's refusal to answer the interrogatories, plaintiff was compelled to depose Jacob Burstyn, president of PREL, at PREL's offices in New Jersey in order to obtain documentary evidence for plaintiff's prima facie case at the inquest (57a). Such notice of deposition was served by plaintiff upon Finkelstein, Benton & Soll (59a) and by letters dated October 24, 1973 (60a), November 1, 1973 (61a), and December 3, 1973 (62a) plaintiff notified Finkelstein, Benton

& Soll of every adjournment of such deposition, including the last adjournment to December 5, 1973. No one appeared for GOLD at this deposition).

The inquest hearing was duly held before Magistrate Jacobs on December 19, 1973 (82a). In accordance with the usual pattern, no one appeared for GOLD (82a). Magistrate Jacobs entered his report on January 2, 1974 recommending that judgment in the amount of $150,000, together with interest at 6% from January 1, 1972 be entered, plus an award of $1,000 for the time that plaintiff's attorney was compelled to expend in discovery because of GOLD's default (90a-91a). Judge Bonsal's memo endorsement approving Magistrate Jacob's report and directing plaintiff to submit a judgment in accordance therewith was filed on January 9, 1974 (2a).

Judgment against GOLD in the total sum of $169,000 ($150,000, plus interest of $18,000 and attorneys' fees of $1,000) was signed by Judge Bonsal on January 17, 1974 and entered on January 18, 1974 (67a-68a). The Clerk duly mailed notice of entry of such judgment (69a).

Thereupon, by notice dated February 6, 1974 (70a), plaintiff noticed, for February 21, 1974 GOLD's deposition "in aid of the judgment against said MEYER GOLD, entered

January 18, 1974". This notice to take GOLD's deposition was served February 6, 1974 upon Finkelstein, Benton & Soll and also, by registered mail, return receipt requested, special delivery, upon GOLD himself (71a). In addition, a second copy of the notice (bearing corrected caption) under cover of letter dated February 6, 1974 was served upon GOLD himself, again by registered mail, return receipt requested, special delivery (72a). The two return receipts were signed by GOLD and/or his wife and returned to plaintiff (73a). GOLD's brief herein admits (pp. 4, 7, 10) that GOLD personally received the notices of deposition.

On February 21, 1974, the date noticed for GOLD's deposition, no one appeared for GOLD and the reporter duly noted GOLD's default (81a). The secretary of William Kaufman, Esq., GOLD's attorney, had called and advised that neither Mr. William Kaufman nor Mr. Gold would attend the deposition (80a).

GOLD's refusal to attend his deposition required plaintiff to make an independent search for GOLD's assets. (The PREL stock owned by GOLD could not be levied upon until its whereabouts was determined). Plaintiff succeeded in ascertaining that GOLD was the owner of a multi-million dollar

apartment complex in Nutley, New Jersey (28a). Plaintiff then caused the judgment against GOLD to be registered in the United States District Court for New Jersey (28a, 74a) and retained New Jersey counsel who attached the apartment complex owned by GOLD in June, 1974 (5a, 28a). GOLD then made, in July 1974, the instant motion to vacate the judgment against him (4a). After Judge Duffy (sitting for Judge Bonsal who was on vacation) denied his motion (92a), GOLD posted bond in the sum of $188,000 in order to stay execution upon his apartment house complex.

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In his affidavit in support of the motion to vacate the default judgment (9a), GOLD, makes the conclusory claims, without any supporting particulars or corroboration of any kind from his two sets of attorneys or otherwise that, "it was my understanding [that the action] was to be primarily responded to by PREL CORPORATION" and that "without my knowledge, a judgment has been entered against me". GOLD's new attorney on this motion also submitted an affidavit in which he, but not GOLD himself states that the firm of Finkelstein, Benton & Soll, GOLD's New York attorneys of record, was dissolved in 1973 (6a).

GOLD's claim of a "misunderstanding" was not supported

by his own attorneys. No affidavit was submitted by William Kaufman, Esq., GOLD's personal attorney in New Jersey, or by anyone from Finkelstein, Benton & Soll, GOLD's New York attorneys of record.

At the hearing before Judge Duffy on GOLD's motion to vacate the judgment against him based on mistake or excusable neglect, neither GOLD himself nor William Kaufman, Esq. appeared. While Mr. Benton of the Finkelstein, Benton & Soll appeared, he remained mute throughout the entire hearing.

Judge Duffy stated in his memorandum denying GOLD's Rule 60(b) motion that the "persistence of the defendant in ignoring the orders of this court, directed both to him and to his attorneys, constituted a blatant disregard for the process of justice" and that "the default was not due to mistake or excusable neglect"(92a).

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In his report, Magistrate Jacobs found that on September 30, 1971 PREL had outstanding 2,057,500 shares of common stock (84a); that in September, 1971 GOLD owned 265,647 shares of PREL, this being in excess of 10% of PREL's outstanding stock (85a); that GOLD received 255,647 shares from PREL on September 16, 1971 as the result of PREL's acquisition of certain properties from GOLD (85a); that also on September 16,

1971 GOLD purchased [through an unconditional agreement of purchase] 10,000 shares of PREL at $7.00 per share (85a); that GOLD sold to one Burstyn 55,647 shares at $10.00 per share, which, matched against GOLD's purchase of 10,000 shares at $7.00 a share, resulted in a 16(b) profit of $30,000 (85a); that GOLD assigned to one Sternberg on December 29, 1971 his agreement to purchase 10,000 shares of PREL stock at $7.00, which 10,000 shares were issued by PREL to Sternberg on January 19, 1972 (86a); that the sales price of the 10,000 shares of PREL transferred in December 29, 1971 by GOLD to Sternberg was unknown (86a); that, however, the bid price of PREL on December 29, 1971 was $22.00 (86a); that such bid price of $22.00 could properly be deemed to be the sales price because of the established law under Section 16(b) that the fiduciary has the burden of proving that the profit was less than the maximum figure (87a-88a); that $22.00 also could properly be deemed to be the sales price because, under Federal Rule 37(b)(2)(A), one of sanctions for failure to comply with a discovery order was an order that "the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order" and that GOLD's purchase of 10,000 shares at $7.00 per share

matched against a sale of 10,000 shares at $22.00 per share to Sternberg produced a 16(b) profit of $150,000 (88a) (which profit was taken as the amount recoverable instead the above-described profit of $30,000 calculated by matching GOLD's purchase of 10,000 shares at $7.00 against his sale of 55,647 shares to Burstyn at $10.00 per share)(85a).

## P O I N T I

THE DISTRICT COURT'S DENIAL OF GOLD's RULE 60(b) MOTION TO SET ASIDE THE DEFAULT JUDGMENT AGAINST HIM WAS ENTIRELY CORRECT AND PROPER AND IN NO RESPECT CONSTITUTED AN ABUSE OF DISCRETION.

A party moving under Rule 60(b) to be relieved of his default must show both that his default was excusable and that his case is meritorious.

Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573, 576 (4th Cir. 1973).

Further, under established principles, the order of the District Court denying or granting a Rule 60(b) motion will not be interfered with upon appeal unless the District Court abused its discretion.

7 Moore's, Federal Practice (Second Edition), pp. 226-231.

In his memorandum decision herein denying GOLD's Rule 60(b) to set aside the default judgment against him, Judge Duffy held that the "persistence of the defendant in ignoring the orders of this court...constituted a blatant disregard for the process of justice.,.that the plaintiff established

a prima facie case before Magistrate Jacobs and that the default was not due to a mistake or excusable neglect." This decision of Judge Duffy, denying GOLD's Rule 60(b) motion, far from constituting an abuse of discretion, was entirely correct and proper.

A bare recital of GOLD's multiple defaults is sufficient to show their blatant and persistent nature. Thus, after first apparently avoiding service for about four months and then serving his answer to the complaint late, GOLD failed and refused to answer the interrogatories that had been personally served upon him with the complaint, notwithstanding the letter dated March 15, 1973 of plaintiff's attorney to William Kaufman, Esq. (GOLD's personal attorney in New Jersey) that GOLD's answers to the interrogatories were necessary to any determination of GOLD's liability under 16(b)(76a); notwithstanding two telephone calls between March 13, 1973 and May 23, 1973 by plaintiff's attorney to Finkelstein, Benton & Soll (GOLD's New York attorneys of record herein) about the interrogatories (25a); notwithstanding plaintiff's motion dated May 23, 1973 to strike GOLD's answer for failure to answer the interrogatories, which motion was served both upon Kaufman & Kaufman (GOLD's personal attorneys in New Jersey)

and Finkelstein, Benton & Soll (34a, 42a); notwithstanding plaintiff's notice of settlement dated May 31, 1973 of an order directing GOLD to answer the interrogatories and striking his answer unless GOLD answered the interrogatories by July 2, 1973 which notice was served upon both Kaufman & Kaufman and Finkelstein, Benton & Soll (44a-46a); notwithstanding plaintiff's motion dated October 5, 1973 for judgment by default, an inquest, and other relief for GOLD's failure to obey Judge Bonsal's order dated June 7, 1973 (directing GOLD to answer the interrogatories and striking his answer unless GOLD did answer the interrogatories by July 2, 1973), which motion was served upon Finkelstein, Benton & Soll (47a-51a); notwithstanding plaintiff's notice of entry dated December 5, 1973 of Judge Bonsal's order dated October 23, 1973 (directing entry of a default judgment against GOLD and the holding of an inquest before Magistrate Jacobs), which notice was served upon Finkelstein, Benton & Soll (63a-66a); and notwithstanding due notice by the Clerk of judgment finally entered herein on January 18, 1974 (69a).

As the capstone, defendant failed and refused in February, 1974, to appear for his deposition pursuant to a notice of deposition specifically stating that GOLD's deposition was to be taken "in aid of the judgment against said

MEYER GOLD, entered January 18, 1974" (70a), which notice of deposition plaintiff served upon GOLD by registered mail (72a-73a) and which indeed GOLD's brief herein expressly concedes (pp. 4, 7, 10) was received by GOLD. GOLD's brief (p. 7) has the temerity to say in respect of this notice to take GOLD's deposition that "MEYER GOLD still unaware of the fact that a judgment had been entered against him obtained a postponement of the deposition which was never rescheduled". The actual facts were that the secretary of William Kaufman, Esq. (GOLD's personal attorney in New Jersey to whom GOLD had referred the notice of deposition) telephoned plaintiff's attorney on the return date of the deposition with the advice that neither GOLD nor Mr. William Kaufman would appear for the deposition (80a) and that the reporter duly noted GOLD's default on the record (81a).

The statement in GOLD's brief (p. 7) that, "It was only after the attachment of his property in June, 1974 did MEYER GOLD realize that a judgment had been entered against him" is not only incredible upon its face but evidences GOLD's utter contempt for the courts and the judicial process as much as does the blatancy of GOLD's multiple and persistent defaults which resulted in the entry of the default judgment against him in the first instance.

GOLD's brief further has the temerity to repeatedly state (pp. 9, 12) in apparent justification of GOLD's defaults that GOLD is a "man of limited education". The actual fact is that GOLD is a wealthy entrepreneur who was attended in this matter by accountants and two sets of attorneys (his personal attorneys in New Jersey and his New York attorneys of record herein).

In excuse of his repeated refusals to answer the interrogatories, GOLD makes the general and conclusory statement in his Rule 60(b) affidavit without any supporting particulars or corroboration whatever, that "it was my understanding [that the action] was to be primarily responded to by PREL CORPORATION and through New York counsel, it was my understanding that an answer had been filed and that the examination of the books and records of PREL CORPORATION was going on". Significantly, however, GOLD refrains from saying under oath, though he seeks to convey the impression that his New York counsel advised him that he was not required to answer the interrogatories. It is inconceivable that any attorney, including Finkelstein, Benton and Soll would have so advised GOLD, particularly since they filed an answer on behalf of GOLD suggesting that there might be collusion between plaintiff and PREL (14a-15a).

Significantly, also, while referring in his affidavit to his New York counsel, GOLD carefully refrains from saying anything whatever about his New Jersey counsel. As noted, plaintiff's attorney corresponded with William Kaufman, Esq., GOLD's personal attorney in New Jersey about the interrogatories and also served the New Jersey firm (as well as Finkelstein, Benton & Soll in New York) with plaintiff's motion dated May 23, 1973 to strike GOLD's answer for his failure to answer the interrogatories. Certainly, both the New York firm of Finkelstein, Benton & Soll and the New Jersey firm of Kaufman & Kaufman did not advise GOLD that he was not required to answer the interrogatories.

In any event, the claimed misunderstanding on the part of GOLD as to his obligation to answer the interrogatories was certainly dispelled when he was personally served by plaintiff with a notice of deposition in aid of the judgment against said MEYER GOLD" or, as referred to in GOLD's brief herein (pp. 4, 7, 11), a notice of deposition "for the discovery of assets". Certainly, William Kaufman, Esq. (GOLD's personal attorney to whom GOLD referred the notice of deposition) advised GOLD at that point that a default judgment had been entered against him.

Notwithstanding the service of the notice of deposition upon GOLD in February, 1974 "for the discovery of assets", GOLD did not make his Rule 60(b) motion until July, 1974, about five months later and only after plaintiff had succeeded in attaching the apartment house complex owned by GOLD in New Jersey. It is incumbent upon a party who seeks to set aside a default judgment upon the ground of mistake or excusable neglect to move under Rule 60(b) not only within the maximum period of one year, as specified in the Rule but also "within a reasonable time" as also specified in the Rule, without laches or undue delay. See 7 Moore's, Federal Practice, pp. 267-268. GOLD's ploy in not moving to vacate the default judgment until his property was attached five months later bars him from relief upon time grounds alone. DiVito v. Fidelity & Deposit Co. of Maryland, 361 F.2d 936, 939 (7th Cir. 1966) (Rule 60(b)motions not made within reasonable time where not made until 4 1/2 months after discovery of claimed fraud); Goldfine v. United States, 326 F.2d 456 (1st Cir. 1964)(delay of over 60 days after first learned of claimed rights upon which Rule 60(b) motion was based makes motion untimely).

GOLD had a good business reason for delaying to move to

vacate the judgment against him. The judgment bears interest of 6 per cent per annum at a time when interest rates are just about double this amount.

GOLD's present and third attorney makes in his affidavit, the bare statement that "the firm of Finkelstein, Benton & Soll, who represented defendant, was dissolved in 1973" (6a). This statement is inconsistent with the fact that the 1974-75 Manhattan telephone directory contains a listing for Finkelstein, Benton & Soll at a new address. But whatever change may have taken place in the structure of the Benton law firm "in 1973" the fact remains that they are still attorneys of record for GOLD and Mr. Benton was present at the Rule 60(b) hearing. GOLD significantly, says nothing in his affidavit about the purported dissolution of Finkelstein, Benton & Soll. On the contrary, instead of claiming a lack of communication with counsel, GOLD makes the inconsistent claim in his affidavit that he was misinformed about his obligations. In any event, the claim of lack of communication now made in GOLD's brief is plainly untenable since GOLD was represented in this matter by two sets of attorneys, one of whom (William Kaufman, Esq. of Kaufman & Kaufman) the record shows to be in continued communication with GOLD even after the entry of the judgment herein in that GOLD referred the notice to take his deposition

to William Kaufman, Esq.

GOLD's brief asserts that the District Court was required to hold an evidentiary hearing before denying his Rule 60(b) motion. However, no one prevented GOLD from presenting whatever evidence he desired upon the Rule 60(b) hearing before Judge Duffy. It was GOLD's own decision not to appear at this hearing; not to present any affidavit, much less testimony, of William Kaufman, Esq., not to present any affidavit by Mr. Benton of Finkelstein, Benton & Soll; and further not to call to the stand Mr. Benton, who was present but who remained mute, at the hearing before Judge Duffy. Indeed GOLD did not even have the good grace to submit upon his Rule 60(b) motion his answersto plaintiff's interrogatories, submitting instead an unresponsive, unsworn, unsigned statement of his accountant having no probative value whatever, as to GOLD's transactions in PREL's stock. Judge Duffy did not prevent GOLD from presenting whatever evidence he desired and, conversely, GOLD did not request Judge Duffy for leave to present any other evidence.

This being so, we merely point out, without extended comment, that the conclusory and general statements in GOLD's affidavit, completely unsupported by any particulars or corroboration whatever, seeking to excuse his default were not

sufficient to raise any substantial issue of material fact and that, in such circumstance, the books are replete with decisions denying Rule 60(b) motions upon the papers. E.g., Parker v. Broadcast Music Inc., 289 F.2d 313, 314 (2nd Cir. 1961); Standard Newspapers, Inc. v. King, 375 F.2d 115 (2nd Cir. 1967)(refusal of District Court to permit reply affidavits not abuse of discretion where substance thereof was presented orally). See 11 Wright & Miller, Federal Practice and Procedure, p.227. (In Standard Newspapers Inc. v. King, supra, this Court specifically denied relief under Rule 60(b) where the defaulting party delayed in moving to vacate the judgment against him until after his property had been attached).

In respect of the merits an unsworn and unsigned statement of GOLD's accountants (7a-8a), who apparently derived their information secondhand from GOLD, was submitted as to GOLD's transactions in PREL's stock. This accountants' statement, having no probative value at all, was submitted in lieu of GOLD's own sworn answers to plaintiff's interrogatories about his transactions in PREL stock.

The accountants' statement seeks to obfuscate GOLD's sale to Burstyn of 55,647 shares of PREL at $10.00 a share (which, when matched against GOLD's purchase of 10,000 shares of PREL for $7.00 a share, results in a 16(b) profit of $30,000). The

The accountants' statement asserts in effect, that it had been agreed to beforehand between GOLD and Burstyn that GOLD was to receive only 200,000 shares from PREL; that for tax reasons, however, GOLD and Burstyn each received 255,467 shares from PREL; that immediately thereafter GOLD turned over to Burstyn 55,467 shares of PREL; and that "actually this transfer should be considered as a post-closing exchange based on a pre-closing agreement". The accountants' statement deceptively omits however, the fact, found by Magistrate Jacobs (85a), that GOLD received from Burstyn $10.00 per share for these 55,467 shares so that clearly these shares were sold by GOLD to Burstyn.

The accountants' statement, further states, along the same line, that GOLD's transfer of 10,000 shares to Oscar Sternberg was only a gift. Strangely, however, this claim of a gift by GOLD of securities having a net value (after deducting their $7.00 per share purchase price) of about $150,000 to an in-law is not supported or corroborated in any way whatever. Neither GOLD nor Sternberg swears on the instant Rule 60(b) motion to such claimed gift and the accountants themselves do not supply copies of GOLD's gift tax return which they presumably would have filed for GOLD if there actually had been any such gift.

The fact is that the accountants' claim of a gift to Sternberg is of one piece with their deceptive claim that there was no sale by GOLD to Burstyn and with the other deceptions practiced on this Rule 60(b) motion, such as the patently false statement in GOLD's affidavit that he did not know about the default judgment against him until his property was attached and such as the patently false statement in GOLD's brief that GOLD obtained a postponement of the deposition to discover his assets which deposition was never rescheduled.

Disdaining the action against him, GOLD caused Judge Bonsal and plaintiff's attorney to spin wheels for over a year. Now that plaintiff has succeeded in attaching his property, GOLD seeks to set aside the judgment against him upon the basis of one or two general and conclusory statements that not only are totally insufficient to show mistake or excusable neglect but are manifestly false. GOLD's Rule 60(b) motion is nothing less than an affront and Judge Duffy was eminently correct to have denied it.

## C O N C L U S I O N

That the District Court properly exercised its discretion in denying the defendant's motion under Rule 60(b) and its order accordingly should be affirmed in all respects.

Dated: New York, N.Y.
January 6, 1975

Respectfully submitted,

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Of Counsel

## Rule 60.

## RELIEF FROM JUDGMENT OR ORDER

**(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

STANLEY L. KAUFMAN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and has his offices at 41 East 42nd Street, New York, New York 10017. That on the 7th day of January, 1975 at No. 747 Third Avenue, New York, N. Y. 10017 deponent served 2 copies of the within Plaintiff-Appellee's Brief upon Lampert & Lampert the attorneys for defendant, Meyer Gold herein, by delivering a true copy thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the attorneys therein.

Stanley L. Kaufman

Stanley L. Kaufman

Sworn to before me this 7th day
of January, 1975.

Stuart Newmark

STUART NEWMARK
NOTARY PUBLIC, State of New York
No. 30-8135465
Qualified in Nassau County
Commission Expires March 30, 1976

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

ENNA PADIN, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 83-20 Britton Avenue, Elmhurst, New York. That on the 6th day of January, 1975 deponent served the within Plaintiff-Appellee's Brief upon the attorneys listed below at their respective addresses, the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository maintained at 41 East 42nd Street, New York, New York 10017 under the exclusive care and custody of the United States Post Office Department within the State of New York.

Borden & Ball
345 Park Avenue
New York, N. Y. 10022

Enna Padin
Enna Padin

Sworn to before me this 6th day
of January, 1975.

Stanley L. Kaufman

STANLEY L. KAUFMAN
Notary Public, State of New York
No. 31-7100300
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

74-2295

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

**KAUFMAN, TAYLOR, KIMMEL & MILLER**

*Attorneys for*

*Office and Post Office Address*

**41 East 42nd Street**

**Borough of Manhattan** **New York, N. Y. 10017**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

**KAUFMAN, TAYLOR, KIMMEL & MILLER**

*Attorneys for*

*Office and Post Office Address*

**41 East 42nd Street**

**Borough of Manhattan** **New York, N. Y. 10017**

To

Attorney(s) for

Index No. Year 19

In the
UNITED STATES COURT OF APPEALS

FANNY HANDEL,
Plaintiff-Appellee

vs.

MEYER GOLD,
Defendant-Appellant

and

PREL CORPORATION,
Defendant

AFFIDAVITS OF SERVICE

**KAUFMAN, TAYLOR, KIMMEL & MILLER**

*Attorneys for* Plaintiff-Appellee

*Office and Post Office Address, Telephone*

**41 East 42nd Street**

**Borough of Manhattan** **New York, N. Y. 10017**

**MUrray Hill 2-2983**

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for